Parmley v. Parmley, 1945 CanLII 13 (SCC), [1945] SCR 635

Supreme Court of Canada

Parmley v. Parmley, [1945] S.C.R. 635

Date: 1945-16-20

J. R. Parmley *(Defendant) Appellant;*

and

T. F. Parmley *(Defendant) Respondent;*

and

Amanda Pearl Yule *(Plaintiff)*.

1945: April 26, 27, 30; 1945: June 20.

Present: Rinfret C.J. and Kerwin, Hudson, Kellock and Estey JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Trespass to the person—Torts—Surgery—Indemnity—Contribution —Judgment for damages against doctor and dentist for unauthorized extraction of teeth while patient under anaesthetic for purpose of another operation—In third party proceedings, indemnity or contribution claimed by dentist against doctor—Facts held not to provide a basis upon which indemnity could be recovered, but judgment given for contribution—Contributory Negligence Act, R.S.B.C. 1936, c. 52.

Judgment had been recovered against appellant, a doctor, and respondent, a dentist, for damages for unauthorized extraction of some of plaintiff's teeth while she was under an anaesthetic for the purpose of an operation by appellant to remove her tonsils. Respondent had not talked with plaintiff before making the extractions, but had had conversations with appellant, who had had conversations with plaintiff and made with respondent the appointment for extractions. Respondent had taken third party proceedings against appellant, claiming indemnity or contribution in respect of any liability to plaintiff found against him, and at trial recovered a judgment for indemnity (1944 CanLII 493 (BC SC), 60 B.C.R. 395), which was, by a majority, affirmed on appeal (1945 CanLII 277 (BC CA), [1945] 1 W.W.R. 405) (the dissenting judges holding that respondent was not entitled to indemnity but was entitled to contribution on the basis of equal liability). On appeal to this Court:

Held: Upon the evidence, the facts did not provide a basis upon which respondent could recover from appellant by way of indemnity. The conversations between them were not such as to amount to a request, instruction or message from appellant to respondent which justified respondent in removing the teeth. In the extractions being, done without plaintiff's consent, both appellant and respondent were negligent, even though they may have believed, upon respondent examining the teeth, that they were acting in plaintiff's best interests (professional duty in such circumstances discussed). But the case was a proper one, under the provisions of the *Contributory Negligence Act*, R.S.B.C. 1936, c. 52, for contribution between appellant and respondent; their pleadings raised the question of fault and the evidence throughout was led with regard thereto and established that their fault or negligence led them to so conduct themselves that in law

they committed a trespass; a trespass may be the result of negligent conduct; they should be held equally at fault and each should bear one-half of the total loss as fixed by the judgment for plaintiff at the trial.

APPEAL by one of the defendants from that part of the judgment of the Court of Appeal for British Columbia[1] whereby his appeal from the judgment of Coady J.[2] in third party proceedings taken by the other defendant, was dismissed.

The appellant is a physician and surgeon. The respondent is a dentist. They are hereinafter referred to respectively as the "doctor" and the "dentist". The plaintiff sued both of them for damages because of unauthorized extraction of some of her teeth while she was under an anaesthetic for the purpose of the performance by the doctor of an operation for tonsillectomy. The dentist took third party proceedings against the doctor, claiming indemnity or contribution in respect of any liability found against him in favour of the plaintiff.

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The evidence in the case is discussed at length in the reasons for judgment in this Court *infra* (and also in the reasons for judgment in the Courts below, cited *supra*).

The trial Judge, Coady J., found that at the time of the extractions the doctor knew or ought to have known that the dentist was relying on the authorization which the doctor led the dentist to believe that he had from the plaintiff, and the dentist proceeded with the extractions on the basis that the plaintiff's consent had been given to the doctor and through the doctor to him; that the doctor did not have such authorization from the plaintiff, and that his words and conduct constituted a representation of authority which he did not have but which the dentist was justified in assuming he did have; that the

evidence failed to establish contributory negligence on the part of the plaintiff. He held that both defendants were liable in damages to the plaintiff. He fixed the general damages for the unauthorized extractions at $4,800 for twelve upper teeth and $200 for one lower tooth and special damages at $200, making in all $5,200, for which sum judgment was given against both defendants. In the third party proceedings he held that the doctor was liable to the dentist for indemnity, extending, however, only to the damages awarded against the dentist for the unauthorized extraction of twelve upper teeth, and costs, as he could not find that there was any instruction or representation of authority by the doctor as to the lower tooth. In the formal judgment it was declared that the dentist was entitled to be indemnified by the doctor against the sum of $5,000 payable by the dentist to the plaintiff under the judgment and against the amount of the plaintiff's costs of action payable by the dentist under the judgment; and it was adjudged that the dentist recover from the doctor any amounts up to the said sum of $5,000 and the plaintiff's costs of action as should be paid by the dentist under the judgment and the dentist's own costs of the action and of the third party proceedings to be taxed, those of the action as between solicitor and client.

The doctor appealed to the Court of Appeal for British Columbia, both against the judgment in favour of the plaintiff and against the judgment in the third party pro-

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ceedings. The dentist did not appeal against the judgment in favour of the plaintiff. He gave notice that he contended that the trial Judge was not in error in holding that he was entitled to be indemnified by the doctor, but that, in the event of the Court of Appeal coming to the conclusion that the trial Judge was in error in so holding, but not

otherwise, he would contend that he was entitled to contribution, indemnity or other relief from the doctor in respect of the sum of $5,000 and costs of the plaintiff payable by the dentist to the plaintiff in proportion to the degree in which the doctor might be found at fault and that the judgment appealed from should be varied accordingly.

The doctor's appeals to the Court of Appeal, both in the action and in the third party proceedings, were dismissed with costs. As to the third party proceedings, however, O'Halloran and Sidney Smith JJ., dissenting in part, held that the dentist was not entitled to indemnity; that the evidence did not justify a finding that the doctor instructed the dentist to extract any of the plaintiff's teeth, or that he warranted to the dentist that he was the agent of the plaintiff with authority to instruct the dentist to extract any of them; all the doctor did was to pass on to the dentist the information that the plaintiff wished to have some teeth extracted, leaving the dentist himself to get particulars and instructions, and later had casually given him what other information he had or thought he had on the matter; that in the operating room both men thought the dentist was justified in extracting whatever teeth he found decayed; but that the parties came within the provisions of the *Contributory Negligence Act,* R.S.B.C. 1936, c. 52; and, being unable to distinguish between their degrees of liability, they held the parties equally to blame, and held that the dentist was entitled to contribution from the doctor upon the basis of equal liability.

The doctor appealed to this Court from that part of the judgment in the Court of Appeal whereby his appeal in the third party proceedings was dismissed. The dentist gave notice of contention in the present appeal in form similar (*mutatis mutandis*) to that stated above on the appeal to the Court of Appeal.

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C. K. Guild K.C. and E. F. Newcombe K.C. for the appellant.

F. J. Hughes K.C. for the respondent.

The judgment of the Chief Justice and Kerwin, Hudson and Estey JJ. was delivered by

ESTEY J.—This appeal arises out of third party proceedings in an action of trespass in which Mrs. Yule, plaintiff, recovered judgment against the defendants J. R. Parmley, a physician and surgeon, and T. F. Parmley, a dentist, in the sum of $5,200 and costs, on the basis that they had removed all of her upper teeth and one lower tooth without her authority.

The order for directions in the third party proceedings named T. F. Parmley plaintiff, J. R. Parmley defendant, and directed that the question of liability between these parties "be tried at or immediately after the trial of this action as the trial judge shall direct."

The judgment of the learned trial judge in these third party proceedings directed the doctor to indemnify the dentist up to $5,000 and costs.

The Court of Appeal affirmed this judgment, but two of the learned judges dissented on the basis that this was not a case for indemnity but rather of contribution and that each defendant should pay one-half.

Mrs. Yule, a young lady of twenty-two years of age, a patient of the doctor, arranged to have her tonsils removed at the hospital on October 12th, 1943. Two of her teeth were bothering her and, as her dentist was on active service, she from time to time mentioned them to Dr. Parmley. On Friday, October 8th, she suggested to the doctor that she would like two teeth removed while she was under the anaesthetic for the tonsillectomy. The doctor suggested, and Mrs. Yule agreed, that she

might have his brother, a dentist whose office was in the same building, make the extraction. He asked that she at once interview him, but Mrs. Yule could not then conveniently do so, and asked if she might see the dentist at the hospital on the morning of the operation. In that request the doctor acquiesced.

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On the same afternoon of October 8th the doctor called at the office of the dentist and the latter deposed as to the conversation:

He came in the door and he said, "Fred, has Mrs. Yule been in to see you yet?" And I said, "No;" "Well, she wants you to take some teeth out at the hospital on Monday." So I looked at my appointment book, and noting it was a holiday I asked him if Tuesday morning would do as well and he said he would get in touch with Mrs. Yule and see if that was agreeable to her, and that was the end of the conversation.

That was on Friday. On Sunday afternoon they met at their mother's for afternoon tea, when the dentist deposes:

I asked my brother if he knew what teeth Mrs. Yule wanted extracted, and he replied, "They are the uppers."

Mr. McAlpine: Excuse me, I didn't get the answer.

Mr. Tysoe: They are the uppers.

The Witness: I replied that I would take my full kit of instruments in any case.

Q. Anything else said?

A. I think that was all at that conversation.

The dentist also stated that he would not deny that the doctor said, "I am not sure but I think it is just the uppers."

The operation was scheduled to take place at 8.30 Tuesday morning. The dentist arrived at the hospital, and when giving his instruments to a nurse for the purpose of having them sterilized, asked her where Mrs. Yule was. On being informed that she did not know, he made no further inquiry but went to the chart room and there remained until he went to the operating room. While there, his brother came into the chart room, they passed the time of day, and the doctor went on into the hospital. A little later the dentist went to the operating room, and finding that Mrs. Yule was already under the anaesthetic, he exclaimed, "Oh, so you have started already." The dentist then for the first time examined Mrs. Yule's mouth and, as he says, found three upper teeth badly decayed, the upper gum tissue in "a very neglected and deplorable condition," and an advanced condition of pyorrhea. He then said to his brother:

Well, Bob, I think the upper teeth should come out, all right, and also this lower left third molar, which is so badly decayed.

To which the dentist says the doctor replied,

Then you had better go ahead.

The foregoing is all that took place between the doctor and the dentist up to the time of the actual extraction.

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On the basis of these brief conversations and his own examination he, assisted by the doctor, extracted all the upper teeth and one lower tooth.

The main case turned upon, what authority, if any, did Mrs. Yule give for the extraction of her teeth? There were conversations extending over a period of time between the doctor and Mrs. Yule. The doctor believed she wanted all of her uppers out. Mrs. Yule wanted only two uppers out, and in any event expected to see the dentist herself. The learned trial judge accepted the evidence of Mrs. Yule.

Mrs. Yule never did see or have any conversation with the dentist respecting her teeth, and the foregoing quotations set forth the conversations between the doctor and the dentist. These provide the basis for the contention of the dentist that he was requested by the doctor to remove the teeth, that he did so in compliance with that request, and as a consequence suffered damage and is therefore entitled to be indemnified.

The question in these third party proceedings is therefore: was there a request by the doctor which authorized the dentist to make the extractions he did?

There is no serious, if any, disagreement between them with respect to these conversations, and therefore it is a matter of the construction thereof. I think it may be pointed out here that the learned trial judge does not make a finding with respect to credibility as between the doctor and the dentist; as between Mrs. Yule and either of them he accepts Mrs. Yule's evidence. He states:

The doctor is, in my opinion, an honest witness, but his memory as to details is not good. He is uncertain in his evidence.

Then with respect to the dentist the learned trial judge does not accept his evidence as to the condition in which he found the teeth. He accepts the evidence of Mrs. Yule, as will appear in a quotation from his judgment hereinafter set out.

The learned trial judge in the course of his judgment states:

The dentist therefore, I find, proceeded with the extractions on the basis that the consent of the plaintiff had been given to the doctor and through the doctor to him;

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and again,

But the doctor's words and conduct in my opinion constituted a representation of authority which he did not have but which the dentist was quite justified in assuming he did have.

This finding, as I read the evidence and the judgment, is a matter of inference and conclusion rather than a question of credibility. In the third party proceedings the dentist, a defendant in the main action, is the plaintiff, and upon him rests the burden of proof. In my opinion, with great respect to the learned trial judge, I do not think in these latter proceedings his conclusion can be supported by the evidence.

The conversations of Friday and Sunday construed most favourably to the dentist, do not, in my opinion, contain an assertion of authority or a request, or the giving of instructions in such clear and definite language as to justify a professional man performing a serious operation.

On Friday the doctor's first words are words of inquiry: "Fred, has Mrs. Yule been in to see you yet?" What follows in this brief conversation is but an inquiry and an intimation that the patient wants "some teeth" extracted. The reason therefor is made neither the subject of an inquiry nor a statement then or at any other time.

Then, as to the effect of the second conversation at his mother's tea on

Sunday, when the doctor had said, "The uppers," or "I think the uppers," the following appears in the dentist's evidence:

Q. You were quite content, I say, to proceed with the extraction on the basis of this conversation which might have been, "I am not sure but I think it is uppers?"

A. I would like to answer yes with a qualification

The Court: That is your privilege. That is your privilege, witness, explain your answer if you wish to.

A. The consent carried by Dr. Parmley to me, along with my own judgment, was the reason that I had to take those teeth out.

There were only the two conversations of Friday and Sunday prior to that in the operating room, and therefore the following is important in the dentists's evidence:

Q. I would like to get this clear, doctor [dentist], as to whether you extracted the upper teeth on the basis of the conversation you say you had with Dr. Robert in the operating room that morning, or whether it was by reason of instructions you thought you had received before then?

A. It would probably be a combination of them. I think all the conversations had a part in the decision, Mr. Yule.

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His appreciation of these two conversations is emphasized by his further evidence:

Q. Isn't it customary to take instructions from the patient personally?

A. We like to see the case we are going to operate on and advise, yes.

Q. Was that your answer?

A. Yes.

Q. Because after all the dentist is the one who knows what teeth should and what teeth should not come out?

A. That is right.

Q. Was it your intention to see Mrs. Yule to find out from her what teeth she wanted out?

Q. I went up with the intention of seeing her mouth, to see the condition of the teeth, and I would have discussed the case with Mrs. Yule if I had seen her.

In view of this evidence it is difficult to understand why he did not make a serious effort to locate Mrs. Yule in this hospital of about forty beds, more particularly as he had not inquired and had not been told why she wanted her teeth out. He knew at that time nothing of the condition of the teeth. Yet, apart from the casual inquiry of the nurse to whom he gave his instruments, he made no effort to locate Mrs. Yule, notwithstanding the fact that the acting matron entered the chart room while he was there. He suggests that he expected to see her in the operating room before she was anaesthetized. This was leaving a most important matter to a time when the patient would be naturally, if not necessarily, disturbed or, as the evidence indicates in this case, Mrs. Yule, who had gone to the hospital the night before, was under the influence of a drug given to her in her room when she went to the operating room. Mrs. Yule states:

When the nurse did come in with the stretcher for me I was feeling

sort of funny from the effects of this hypo; I wasn't just myself. I don't remember very much. I remember seeing the doctor and the nurse in the operating room, and that is all I remember.

The dentist admits he was familiar with the hospital, and under all the circumstances he cannot be excused for not having located Mrs. Yule at a time when he could make an examination and discuss the condition of her teeth with her.

It is now important to observe that the dentist was here called upon in his professional capacity and therefore at all times material hereto a relation of dentist and patient existed between himself and Mrs. Yule. She was a young lady of twenty-two years of age, known to the dentist but

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who had not prior thereto been a patient of his. He believed that she had not received professional advice with respect to her teeth.

Q. And your thought was in this particular case that Mrs. Yule had made her own diagnosis?

A. As far as I was concerned, yes.

The dentist therefore knew, or ought to have known, that she was not in possession of that information that a patient was entitled to before arriving at a decision so important that it involved the extraction of many of her teeth.

In the operating room, as he entered upon his examination, he had no idea why she wanted her teeth removed. He then found the condition of pyorrhea. It had not been mentioned to him before, nor did he there mention it to his brother. He takes the position that both the diagnosis

and treatment of pyorrhea are matters for the dentist, and by way of further clarifying his position he says:

I think Dr. Parmley was not asked for his professional judgment on pyorrhea. I think it was a straight matter of carrying consent from the patient to myself.

When one keeps in mind that pyorrhea was first discovered by the dentist in the operating room, the following evidence given by the dentist is important:

Q. *** you would not, or would you, doctor, expect to be instructed under the circumstances by Dr. Parmley for the extraction of teeth on account of a pyorrhea condition?

A. I was willing to carry his message of consent rather than a question of instructions.

Q. In other words, you took the position to be this: When Dr. J. R. Parmley came to you he merely conveyed to you the wishes of Mrs. Yule?

A. That is right, sir.

Q. And that is all he was endeavouring to do?

A. That is right.

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Q. And before you proceeded with the extraction, doctor, you have said that you spoke to the doctor?

A. Yes, sir.

Q. And you told him about the condition that you found, or did you?

A. Yes, just a very brief outline.

Q. That you had found in the mouth?

A. Yes.

Q. And why did you tell him?

A. Probably through courtesy—to gain further consent, I think, seeing he was carrying the consent he was entitled to know.

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Q. And there wasn't any occasion for speaking to him about the uppers?

A. I think I just told you, sir, it was a courtesy conversation.

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In my opinion there is no request, instruction or message which justified the dentist in removing the teeth. An analysis of these conversations shows an absence of precise and definite language. The learned trial judge describes the doctor as "uncertain in his evidence," and certainly one gets that impression as he reads his evidence. Upon the points most important to the dentist he is particularly uncertain and indefinite. He never becomes more specific in his statements than to say, "some teeth," "the uppers," "I think the uppers." These conversations are so general, vague and ambiguous that in my opinion a professional man is not justified in acting upon them.

It seems to me that had the patient herself, Mrs. Yule, made such statements to the dentist, he would not have proceeded, and would not have been justified in proceeding, without making an examination of her teeth and advising and consulting with her; then, if she desired and requested that her teeth or any of them be extracted, the dentist would be justified in proceeding to do so.

Force to the person is rendered lawful by consent in such matters as surgical operations. The fact is common enough; indeed authorities are silent or nearly so, because it is common and obvious. Taking out a man's tooth without his consent would be an aggravated assault and battery. With consent it is lawfully done every day. [Pollock on Torts, 14th ed., p. 124.]

The respondent has contended that the doctor in the operating room should have there prevented the dentist from removing the teeth. There is much to be said for that view. At the same time that does not excuse the dentist. His duty to the patient remained the same. In my view they were both negligent, particularly in the operating room, not with respect to the quality of any work there performed, that is not an issue. In that room it was in proceeding to extract the teeth without the consent of the patient. The dentist knew she had received no advice, and yet upon these vague, and general statements he proceeded with a serious operation.

The conclusion appears unavoidable that both of the parties hereto, particularly in the operating room, failed to recognize the right of a patient, when consulting a pro-

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fessional man in the practice of his profession, to have an examination, a diagnosis, advice and consultations, and that thereafter it is for the

patient to determine what, if any, operation or treatment shall be proceeded with. *Slater* v. *Baker*[3] ; 22 Halsbury, 2nd ed., p. 319, par. 603; *Marshall* v. *Curry*[4] ; *Schloendorff* v. *The Society of the New York Hospital*[5] ; *Kinney* v. *Lockwood Clinic Ltd.*[6] . Mrs. Yule obviously expected just that. She had been so treated with respect to the tonsillectomy.

It may be that in the operating room the parties hereto were of the opinion that they were acting in the best interests of Mrs. Yule in extracting the teeth, but that is not the point. That would have been very important in their consultation with and their advising of Mrs. Yule, but it does not justify their proceeding without her consent. As was said by Garrison J., "No amount of professional skill can justify the substitution of the will of the surgeon for that of his patient." *Bennan* v. *Parsonnet*[7]

There are times under circumstances of emergency when both doctors and dentists must exercise their professional skill and ability without the consent which is required in the ordinary case. Upon such occasions great latitude may be given to the doctor or the dentist. In this case it is not even suggested, nor is there any evidence to suggest, that any such circumstances exist. In a matter of a very short time the condition of her teeth could have been discussed with the patient. There was no reason for an immediate extraction. Her position under the anaesthetic for the tonsillectomy provided a convenient, but not a necessary, opportunity for the removing of her teeth.

It was urged that the dentist was entitled to take the position upon these conversations with the doctor that he was to remove these teeth unless in his judgment they ought not to be removed. In view of what I have already said, I do not think such a position is tenable in law, and even if it was, it is not open to the dentist in this case because here the

learned trial judge has found that the condition of the teeth which the dentist represents as his justification for removing them, did not exist.

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On the whole of the evidence I am of the opinion that the dentist has failed to establish by a preponderance of evidence that the condition of the teeth was as he states, or if it was, that the teeth could not have been successfully treated. I have no hesitation in accepting the evidence of the plaintiff that she had no knowledge of the existence of a condition such as the dentist says he found, or of any condition other than she has described. I find it difficult to believe that a condition such as the dentist has described could have been present without her knowledge. The teeth may not have been and possibly were not in as good condition as she thought, but on the other hand I am not satisfied the condition was such as the dentist has stated. This examination was hastily made, and made, too, on the assumption that she wanted all the upper teeth out, and that the doctor for some reason wanted them all out.

So far as the last remark, "that the doctor for some reason wanted them all out," is concerned, with great respect I can find no evidence to support it. Apart, however, from this last remark, the learned trial judge in effect has found that the dentist removed teeth which he was not justified in removing, and therefore provided the basis for the substantial damages awarded in this case.

In my opinion the doctor, himself a professional man, in using the vague, general and ambiguous terms which I have already quoted and in not protecting his patient from, rather than acquiescing in, the conduct of the dentist, is himself negligent.

I am also of the opinion that the dentist in going forward and making

the extractions as he did, without any inquiry as to why this young woman of twenty-two years of age wanted all of her upper teeth out, relying on conversations or, as he prefers, "messages", in the vague, general and ambiguous terms I have quoted; in not seeing Mrs. Yule, examining her teeth, advising and consulting with her before she went under the anaesthetic; and in removing teeth which were not in the condition he describes, was in all of these particulars himself negligent.

The dentist as plaintiff asks indemnity from the doctor on the basis that the latter requested him to remove the teeth. On his behalf counsel cites Underhill on Torts, 14th ed., p. 43:

If one person does an act at the request of or under the directions of another, which is neither manifestly tortious nor tortious to his knowledge, he will be entitled to be indemnified by that other against all liability which he may incur by reason of that act proving to be a tort, whether he be servant or agent of that other or not.

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The basis for an indemnity based upon a request is set forth as follows:

The law implies from the request an undertaking on the part of the principal to indemnify the agent if he acts upon the request. It is true that this is not confined only to the case of principal and agent, there are other cases which it is not necessary to examine now. But they all proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so.

Bowen L.J., in *Birmingham and District Land Co.* v. *London and North Western Railway Company*[8] .

In my opinion, for the reasons already discussed, there was no request which authorized the extraction of the teeth.

Then if there was a request and there be given to that request the certainty, the definiteness and the extent which the dentist asks, any compliance therewith involves the exercise on the part of the dentist of his professional skill and knowledge. There is no language which restricts or eliminates the duty which devolves upon him as a professional man toward the patient; indeed in this case he admits he applied his professional skill and ability; and therefore I do not think that this type of request, nor the relations which existed between the doctor and the dentist, provides a basis or a foundation for the implication of a promise to indemnify.

Counsel for the dentist cites *Secretary of State* v. *Bank of India, Ltd.**[9]*, and quotes the following passage from Lord Wright at p. 801:

There is nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant. Indeed, in the simpler type of case illustrated by *Dugdale* v. *Lovering**[10]* it is not necessary that the plaintiff should have been other than a free agent. He may act on the defendant's request, not under compulsion, but of choice. That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right.

In that case there was the duty upon the person entitled to a government promissory note to satisfy the officer employed by the government of the justice of the claim. There the party did so satisfy the officer, but did so by the

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presentation of a document which appeared complete and regular upon its face but which was in fact a forgery. It was held that the fact the officer was satisfied and therefore exercised his judgment but in so doing did not detect the fraud that was intended to deceive and mislead him, did not deny to his employer the right to be indemnified.

The facts in that case are so different as to make it clearly distinguishable. In the case at bar the dentist was, however one construes the words spoken, invited or requested to act in his professional capacity. There was no fraud or deception practised upon him, and had he sought to satisfy himself or to have discharged his professional duty he would not have committed the trespass which imposed upon him the damage or loss.

Moreover, if the language used in the conversations is construed as constituting a request, then by virtue of his negligent conduct he cannot recover on the basis of indemnity. The language of Swinfen Eady L.J., appears particularly appropriate where, after quoting certain well known facts of the law, he continues:

The statement of the law which I have just read, in which it is held that the defendant is bound to indemnify the plaintiff against the consequences of an act done at his request, must be read as meaning that the plaintiff, who claims the indemnity, must have acted without negligence, and that the injury to the third party must be the direct result—that is, the natural and direct consequence—of doing the particular act the plaintiff was requested to do, and not a consequence merely arising from the manner in which the act was done. *[W. Cory & Son* v. *Lambton and Hetton Collieries[11]* .]

In my opinion, the facts of this case do not provide a basis upon which the dentist may recover from the doctor by way of indemnity.

The dentist, in the alternative, claims a right to contribution under the provisions of the *Contributory Negligence Act,* ch. 52, R.S.B.C. 1936. Sec. 2 reads as follows:

2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:—

(*a*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b*) Nothing in this section shall operate so as to render any person liable for any damage or loss to which his fault has not contributed.

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It was contended that because Mrs. Yule's action is founded in trespass, there should be no right to contribution under the foregoing Act, on the basis that it was restricted to cases of negligence. It was pressed that the word "fault" was synonymous with the word "negligence," and therefore did not include trespass. There is authority that the word "fault," as used in the *Maritime Conventions Act,* 1911 (1 and 2 Geo. V., ch. 57), upon which the British Columbia *Contributory Negligence Act* is modelled and from which it is substantially copied, means negligence.

There can be no question but that the word "fault" includes negligence, but whether it is a somewhat wider term as used in the British Columbia Act, in my view it is not necessary here to determine.

It appears to me that these third party proceedings constitute an action between two persons whose joint fault caused them to suffer "damage

or loss," and the Court must determine whether this is a proper case in which the damage or loss should be apportioned between these parties. To do so in a proper case is precisely the purpose of the Act, and the pleadings of both parties here raised the question of fault, and the evidence throughout is led with regard thereto. It establishes that their fault or negligence led them to so conduct themselves that in law they committed a trespass. It is clear upon the authorities that a trespass may be the result of negligent conduct. 33 Halsbury, 2nd ed., pp. 3 and 30.

The reasons for judgment rendered in *The Cairnbahn[12]* are applicable to this case. That was decided under the *Maritime Conventions Act,* 1911. A hopper-barge, without any blame on the part of those in control thereof, suffered damage in a collision due to the fault of two other vessels. At p. 33 Lord Sumner states:

The word "loss" is wide enough to include that form of pecuniary prejudice which consists in compensating third parties for wrong done to them by the fault of persons for whose misconduct the party prejudiced must answer.

In my opinion, this is a proper case for contribution between the parties.

It is always difficult to determine, apart from special circumstances, the proportions of the damage or loss which should be assumed by or apportioned to the respective

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parties. In this case, having regard to the fact that both parties were negligent throughout and both parties took part in the extraction, it seems to me that both parties are equally at fault and therefore each

should bear one-half of the total loss as fixed by the judgment rendered in favour of Mrs. Yule.

In my opinion this appeal should be allowed, in the third party proceedings the plaintiff should pay one-half of the claim and costs as fixed by the judgment of the learned trial judge in favour of Mrs. Yule at the trial, that in the third party proceedings there should be no costs to either party at the trial, that the doctor should pay the costs of the appeal to the Court of Appeal for British Columbia, and that the dentist should pay the costs of appeal to this Court.

KELLOCK J.—I concur in the result proposed by my brother Estey.

Appeal allowed (and judgment as stated in above reasons) with costs.

Solicitor for the appellant: W. S. Lane.

Solicitor for the respondent: Charles W. Tysoe.

Hopp v. Lepp - SCC Cases

SUPREME COURT OF CANADA

Hopp v. Lepp, [1980] 2 S.C.R. 192

Date: 1980-05-20

Phillip G. Hopp (Defendant) Appellant; and

Aron E. Lepp (Plaintiff) Respondent.

1980: March 20; 1980: May 20.

Present: Laskin C.J. and Martland, Ritchie, Beetz, Estey, McIntyre and Chouinard JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Physicians and surgeons — Negligence and battery — Informed consent — Duty of disclosure — First operation — Routine disc operation — Seriousness of operation — Special and unusual risks — Specific questions by patient.

The appellant is an orthopedic surgeon practising in Lethbridge, Alberta. He had performed a disc operation on the respondent, having first obtained his formal signed consent. A myelogram had disclosed a block in the spinal canal and the appellant had removed a portion of the disc between the third and fourth lumbar vertebrae (the operation is known as a hemilaminectomy). An X-ray confirmed that the blockage had been removed. Subsequently, with the respondent not improving as expected, it was determined that a blockage still existed and the appellant referred the respondent to a neurologist in Calgary who discovered a complete blockage between the third and fourth vertebrae.

A Calgary neurosurgeon was called in who performed an extensive decompressive laminectomy from the second to the fifth lumbar vertebrae. This operation, involving considerable exploring, revealed a large chunk of extruded disc material between the third and fourth lumbar vertebrae, and it was removed. The respondent, who was left with permanent disability, sued the appellant for damages sounding in negligence and in battery. The trial judge dismissed the action in so far as it was founded on negligence—there was no appeal with respect to that finding—and dismissed it also on the second branch of the respondent's claim. The Court of Appeal, by a majority, allowed the appeal, holding that the consent given to the operation was not an informed consent and hence there was an unlawful invasion of the respondent's bodily security, a battery or assault. It awarded damages of $15,000.

Held: The appeal should be allowed.

The main issue argued before this Court was whether there was informed consent. A patient's consent will give protection to his surgeon or physician only if the patient

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has been sufficiently informed to enable him to make a choice whether or not to submit to the surgery. The issue of informed consent is at bottom a question whether there is a duty of disclosure, and, if so, the extent or scope of the duty.

In the present case, there were three aspects to this issue. 1) Did the appellant have the duty to tell the respondent that it would be his first such operation after obtaining his specialist licence and entering private practice? The trial judge held correctly that the appellant was fully qualified and was under no obligation to tell the respondent that

this was his first operation, when it was clear that he was not inexperienced. 2) Did the appellant have the duty to tell the respondent that if there were complications he would not be able to call on any neurologist or neurosurgeon in Lethbridge because there were none there at the time? Here, the expert evidence was that the operation was a routine disc operation and could be performed as well in Lethbridge as in Calgary, and the trial judge correctly held that although there was a possibility of complications as there is in any operation, there was no probability of that, and where there is no special or unusual risk involved, the surgeon or physician is not obliged to alert the patient. 3) What is the duty of disclosure of the appellant with respect to the seriousness of the operation? Here, the respondent's own evidence shows that the question of the seriousness was subsumed in the issue of the appellant's qualifications and in whether the operation could be performed as well in Lethbridge as in Calgary.

If no specific questions are put as to possible risks, the surgeon is under no obligation to tell the patient that there are possible risks since there are such risks in any operation. The decided cases appear to indicate that a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation. However, the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case. Here, there was no reason for this Court to disagree with the findings of the trial judge.

Parmley v. Parmley and Yule, [1945] S.C.R. 635; Halushka v. University of Saskatchewan (1965), 53 D.L.R. (2d) 436; Smith v. Auckland Hospital Board, [1965] N.Z.L.R. 191; Kenny v. Lockwood, [1932] O.R.

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Nocton v. Ashburton, [1914] A.C. 932; Hedley Byrne v. Heller, [1964] A.C. 465; Canterbury v. Spence (1972), 464 F. 2d 772; Male v. Hopmans (1967), 64 D.L.R. (2d) 105; Kelly v. Hazlett (1976), 15 O.R. (2d) 290, referred to.

APPEAL from a judgment of the Court of Appeal of Alberta[1], allowing the appeal by the respondent of the judgment of the Supreme Court of Alberta. Appeal allowed.

J. C. Major, Q.C., and F. Dearlove, for the appellant.

J. N. Le Grandeur, for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—This appeal, which is here by leave of this Court, concerns the liability of the appellant doctor, an orthopedic surgeon practising in Lethbridge, Alberta, for damages sounding in negligence and in battery. He had performed a disc operation on the plaintiff, then sixty-six years of age, on March 20, 1974, having first obtained the plaintiffs formal signed consent. The operation was competently performed. It was preceded by a myelogram on March 13, 1974, which disclosed a block in the spinal canal, confirming a diagnosis made by the plaintiff's family physician and also by the appellant who had been called in for consultation.

The defendant had removed a portion of the disc between the third and fourth lumbar vertebrae (the operation was known as a hemilaminectomy) and a subsequent probe of the area satisfied the appellant that the spinal cord could be freely manipulated and that,

consequently, the plaintiff would be relieved of his prior symptoms and the pain which first afflicted him on his return to Lethbridge on February 25, 1974, from a motor trip. An X-ray on March 25, 1974, confirmed the appellant that the blockage disclosed by the myelogram had been removed by the operation.

Subsequently, with the plaintiff not improving as expected, it was determined that a blockage still existed and the appellant referred the plaintiff to a

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neurologist in Calgary who, after examination and a myelogram, discovered a complete blockage between the third and fourth lumbar vertebrae. A Calgary neurosurgeon was called in who, on April 27, 1974, performed an extensive decompressive laminectomy from the second to the fifth lumbar vertebrae. This operation, involving considerable exploring, revealed a large chunk of extruded disc material between the third and fourth lumbar vertebrae, and it was removed. The trial judge found that this extruded material only became apparent because of the extensive and exploratory nature of the second operation and, if present when the appellant performed the much less complex operation, it was not unreasonable that it would not have become apparent to him.

Unfortunately, as the trial judge has found, the plaintiff has been left with permanent disabilities because of permanent damage to certain nerves in the nerve root canal. However, the trial judge found that there was no negligence on the appellant's part either in his diagnosis or in deciding, on the basis thereof, to perform the particular operation that he did perform. Nor was there any negligence in the post operative care and treatment of the plaintiff, nor was it unreasonable for the

appellant to wait as long as he did, about a month, before calling in other specialists. Accordingly, he dismissed the action in so far as it was founded on negligence. The findings and conclusion of the trial judge on this branch of the case were not questioned in the Alberta Appellate Division (now known as the Alberta Court of Appeal). That Court, by a majority, differed, however, with the trial judge on his dismissal of the action on the second branch of the plaintiff's claim, holding, that the consent given to the operation was not an informed consent and hence there was an unlawful invasion of the plaintiff's bodily security, a battery or an assault. It awarded damages of $15,000.

Whether there was informed consent was the main issue argued in this Court. It is an issue that comes before this Court for the first time. The

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term "informed consent", frequently used in American cases, reflects the fact that although there is, generally, prior consent by a patient to proposed surgery or therapy, this does not immunize a surgeon or physician from liability for battery or for negligence if he has failed in a duty to disclose risks of the surgery or treatment, known or which should be known to him, and which are unknown to the patient. The underlying principle is the right of a patient to decide what, if anything, should be done with his body: see Parmley v. Parmley and Yule[2], at pp. 645-46. (I leave aside any question of emergency or of mental incompetency and, also, situations where the operation or treatment performed or given is different from that to which the patient consented.) It follows, therefore, that a patient's consent, whether to surgery or to therapy, will give protection to his surgeon or physician only if the patient has been sufficiently informed to enable him to make a choice whether or not to submit to the surgery or therapy. The issue of informed consent is at bottom a question whether there is a duty of

disclosure, a duty by the surgeon or physician to provide information and, if so, the extent or scope of the duty.

In the present case, there were three aspects to this issue. First, the appellant told the plaintiff that he was qualified to perform the operation, but did not tell him that it would be his first such operation after obtaining his specialist licence and entering private practice in Lethbridge. Second, he told the plaintiff that the facilities for performing the operation were as good in Lethbridge as they were in Calgary where the plaintiff had thought of going, but did not indicate to him that if there were complications he would not be able to call on any neurologist or any neurosurgeon in Lethbridge because there were none there at the time. Third, he did not tell the plaintiff that the operation was a serious one, but rather that it was not serious and the plaintiff would be up and about in six to ten days.

On the first aspect, the evidence showed that the appellant had performed many such operations

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while a resident in a teaching hospital, and about thirty of the more than sixty performed by him were done without actual supervision although there was a specialist at hand. The trial judge found that the appellant was fully qualified and was under no obligation to tell the plaintiff that this was his first operation after his certification. In the trial judge's view, it would be ridiculous to require a licensed specialist to tell a patient (at least without being asked) how many operations of the kind in question he had performed when it was clear that he was not inexperienced. On the second aspect, the expert evidence was, as the trial judge found, that the operation was a routine disc operation and could be performed as well in Lethbridge as in Calgary. There was,

the trial judge said, a possibility of complications as there is in any operation (and in this respect there could be an advantage in having the operation in Calgary where there were other specialists available) but, again on the evidence, there was no probability of that, and there was no special or unusual risk involved that would then oblige the appellant to alert the plaintiff to it. The trial judge relied in this respect on the judgment of Hall J. in Halushka v. University of Saskatchewan[3], at p. 442.

There was no specific finding by the trial judge on the question of the seriousness of the operation, but it seems to me that the answer was comprehended in the evidence that the particular operation was a routine one and in the finding of the trial judge to that effect. The trial judge also said that, after the myelogram on March 13, 1974, which disclosed the block in the spinal canal, "the defendant spoke to the plaintiff and told him the results thereof and advised him that the only solution to the problem was surgery and went into some detail with respect to the operation which was recommended". It did not, therefore, appear to. the trial judge that there was any real issue about the patient not knowing of the seriousness of the operation. The plaintiff's own evidence shows that the question of the seriousness of the proposed

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operation was subsumed in the issue of the appellant's qualifications and in whether the operation could be performed as well in Lethbridge as in Calgary. Moreover the basic complaint of the plaintiff, as his counsel averred during the argument of the appeal in this Court, was that the plaintiff did not know the operation on the plaintiff was the first that the appellant performed after beginning private practice in Lethbridge. This, however, goes to his qualifications, and on this the

trial judge's finding appears to me to be unassailable.

I should add that the trial judge also held that even had he found negligence on the part of the appellant, there was no proof of damages flowing from it. Similarly, there was no proof of damages from the assault or battery, and only token damages could be awarded when the operation was a necessary one and was properly performed.

Prowse J.A., who dissented from the majority in the Alberta Appellate Division, supported the trial judge's conclusion adverse to the plaintiff on the ground that there was no specific question asked by the plaintiff that would have directed the appellant to disclose risks that were mere possibilities and thus would have weighed in favour of having the operation in Calgary. In his view, which was the view of the trial judge, the conversations or discussions that were alleged to have raised such a specific question were concerned with the appellant's competence and qualifications. Had there been a specific question of the kind alleged (and, I assume, it would be sufficient if the question or questions asked could reasonably be construed as inviting a response to possible risks), it would have been the duty of the appellant to answer it.

This brings me to consider the majority reasons of the Alberta Appellate Division delivered by Morrow J.A. He framed the issue of informed consent as it was argued by counsel for the plaintiff, namely, on the basis of assault and battery and of negligence resulting from the failure to disclose the risks involved. Whether it is consistent with an allegation of assault and battery, based on want of a valid consent, to undergird it with an

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assertion of negligence is not a question which I need to discuss or resolve in the present case. The argument advanced in the Appellate

Division was also advanced in this Court. Morrow J.A., in allowing the plaintiff's appeal, based himself on both battery and negligence, adding this:

I would include negligence in the above as on the facts present in this appeal the same reasoning as is appropriate for battery is on my understanding of the authorities equally appropriate for negligence.

Presumably, the negligence here lay in unspoken words or in misleading words when there was a duty to speak and to be properly responsive. Since I am of the opinion that there was no warrant here for interfering with the trial judge's conclusion on the issue of informed consent (or, to put it in what I think is the preferable way, namely, that the appellant had properly discharged any duty of disclosure), I prefer to leave questions touching the relationship or availability of battery and negligence on that issue to another time.

What Morrow J.A. did was to reexamine the evidence which was before the trial judge, quoting extensively from it. He did not clearly or directly challenge the trial judge's finding that the appellant was fully qualified and had no obligation to tell the plaintiff that the operation he was going to perform was his first in private practice. Nor did Morrow J.A. squarely deal with and set aside the trial judge's finding that the particular operation could be done as well in Lethbridge as in Calgary.

What the learned Appellate Court judge fastened on was the seriousness of the operation and the failure of the appellant to go into some detail about the risks, whether probable or possible. This is what Morrow J.A. said on the various points raised in respect of informed consent:

With respect, I am unable to agree that if the evidence might have justified a conclusion that this particular doctor was competent to do

the operation and that the facilities were adequate at Lethbridge this by itself provided a complete answer to the issue raised with

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respect to proper instructions and to the giving of a valid and informed consent.

While it may be that there was no obligation on the doctor to volunteer that this would be his first operation on his own, that is not what he was being asked. Rather, before the patient gave his consent to the operation he wanted some assurance as to "how serious" the operation was. The seriousness of the operation has to also be considered along with his previous decision with the patient and his wife to have the operation in Calgary. Now can it be said that to reply to the query of "how serious" by saying "it is not serious, in six to ten days you will be back home running around like you did before" and so answer the query about Calgary by a reply to the effect "he could do it as good as any doctor in Calgary".

I have to observe that the reply given to the Appellant is almost identical to that to be found in Smith v. Auckland Hospital Board, [1965] N.Z.L.R. 191. As in that case there was nothing said about the risk whether one takes that as "probable" or as "possible".

And there is this further concluding summarizing passage:

I am unable to find on a careful reading of the evidence, and reading it in a manner most favourable to the respondent, that the respondent doctor ever gave any further information or explanation to his patient. Then, looking at the remarks of the learned trial judge it seems to me that the judge takes the statements of the medical experts as to the nature of the actual operation, the technique followed, and their

statements that for such an operation as was carried out if without complication, the Lethbridge facilities were adequate, and substitutes them or uses them as constituting a truthful explanation by the respondent himself. To nie this constitutes a manifest error and I would allow the appeal here and substitute a judgment in favour of the appellant based on both battery and negligence.

The way in which Morrow J.A. dealt with the appellant's response to an inquiry about the seriousness of the operation would make the response inadequate, assuming there was a specific question about the risks. However, it is clear from the trial judge's finding, that the appellant had gone into some detail about the operation—and I have already referred to this finding—-and that any question about the seriousness of the operation

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cannot be isolated from the conversations between the parties touching the operation and touching whether it could be performed as well in Lethbridge as in Calgary.

It is not clear from Morrow J.A.'s reasons whether he considered that the patient had raised a specific question about possible risks, nor is it at all clear from the evidence that there was more than a general discussion about the operation. In the Auckland Hospital case, there was a specific question raised about the risks, and this then, on the view there taken by the New Zealand Court, put upon the doctor an obligation to respond by indicating even possible risks. I shall return to this issue shortly. I am prepared to take it from Morrow J.A.'s reference to the New Zealand case that he considered that there was a specific question about risks, enveloped in the inquiry about the seriousness of the operation. However, I am of the opinion, as apparently was the trial

judge, that this is an unwarranted extrapolation of the evidence. Indeed, there is nothing in the record to support the conclusion that there were possible risks in the particular operation different from the possibilities that exist in any operation, leaving aside whether a specific question was raised as to risks.

Kenny v. Lockwood[4] is an early Ontario case on informed consent or on the duty of disclosure, and on its facts bears a resemblance to the present case. There, one of the issues was whether a surgeon had failed in an alleged duty to inform a patient of the seriousness of an operation which resulted in permanent injury, although the operation was competently performed. A special difficulty for the plaintiff patient in the Kenny case was that she had pleaded that the surgeon and an associated physician had "falsely and recklessly, without caring whether it was false or true or without reasonable ground for believing it to be true", represented the operation as "simple" and that "her hand would be all right in three weeks". The Court of Appeal found that there was no fraud or recklessness amounting to fraud. It none the less examined an allegation of breach of duty,

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apart from fraud, in the description of the operation as simple and in the failure to point out its seriousness in that, if not successful, it might result in permanent injury. The Court of Appeal founded its assessment on Nocton v. Ashburton[5], taking the relationship of surgeon and patient to be a fiduciary one, requiring honesty from the surgeon. Nocton v. Ashburton is, of course, a case which was one of the underpinnings of the more extensive doctrine propounded in Hedley Byrne v. Heller[6].

The trial judge in the Kenny case had imposed liability upon the

surgeon and an associate, expressing himself as follows:

I hold as a matter of law that it was the duty of the surgeons when they accepted the plaintiff as their patient to inform her as to the seriousness of her submitting to the operation at that time, and of the fact that the disease was of such a character as that it might not for a number of years cause her much suffering or inconvenience; and that the surgeons were not entitled to operate upon her hand until they put that matter with perfect frankness and plainness before her and then had her decision that she would or would not submit to the operation at that time.

The contrast between that case and the present one lies in the fact that there the trial judge ignored evidence of the surgeon that he had discussed the operation with the patient and had explained in detail to her the condition of her hand, afflicted with a progressive disease, and the operation. In the present case the trial judge had considered like evidence but it was the Alberta Appellate Division that played down this evidence.

There are observations in the Kenny case that point to the later developments as to the duty of disclosure and the later clarifications of issues not there worked out in the detail with which they have been handled in later, especially American cases and in literature on the subject: see, for

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example, Canterbury v. Spence[7]; Comment, "Informed Consent as a Theory of Medical Liability", [1970] Wisc. L. Rev. 879; Waltz and Scheuneman, "Informed Consent to Therapy", (1970), 64 N.W.U.L. Rev. 628; Comment, "Informed Consent—A Proposed Standard for Medical Disclosure", (1973), 48 N.Y.U.L. Rev. 548; Skegg, "Informed Consent to

Medical Procedures", (1975), 15 Med. Sci. Law 124. The Ontario Court of Appeal, in reversing, by a majority, the trial judge and absolving the surgeon and his associate of liability, made it clear that the facts of the particular case are highly relevant in determining whether a duty to inform arises and its extent. There was not much authority to go on, and Nocton v. Ashburton offered the best guidance as to the existence of a duty and as to its breach which, as Lord Haldane said in that case, would be "negligence in word". He added that "the difficulty as regards the principle lies in its application to individual cases".

Hodgins J.A. in the Kenny case proceeded from this as follows: (at p. 156)

In particularizing its application it is stated that the duty arises: "In those cases where a person within whose special province it lay to know a particular fact has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course."

It is assumed to arise in those cases where there was a breach of a duty to which equity had attached its sanction arising from the circumstances and relation of the parties, and the duty does not necessarily depend upon the putting of a question. It may arise where the very situation of the parties implied the necessity for an explanation or a warning and includes a moral, as distinguished from a legal duty to be careful, and as an obligation it arises out of the duty independently of contract or of special obligation. For, as Lord Haldane remarks, "If a man intervenes in the affairs of another

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he must do so honestly, whatever be the character of that intervention."

And there is this further pertinent observation (at p. 159):

Nor do I for a moment think that the dangers inseparable from any operation, such as failure or death under an anaesthetic, the danger of infection, of tetanus, of gas gangrene or gangrene, were proper or necessary to be disclosed to a patient before an operation.

I would add, taking the trial judge's finding on the point in the present case, that the risk or possibility of complications as being more easily dealt with in larger centres is also common to all operations and does not ordinarily call for particular disclosure.

Kenny v. Lockwood is important as much for what it portended as for what it actually decided. It indicated that a surgeon who recommends an operation which involves known risks, that is probable risks, or special or unusual risks, is under an obligation to his patient to disclose those risks and, if he fails to do so, and injury results from one of the undisclosed or not fully disclosed risks, the patient's consent to the operation will be held to be not an informed consent, although the operation itself was competently performed. Apart from situations of this kind, a surgeon need not go into every conceivable detail of a proposed operation so long as he describes its nature, unless the patient asks specific questions not by way of merely general inquiry, and, if so, those questions must be answered, although they invite answers to merely possible risks. If no specific questions are put as to possible risks, the surgeon is under no obligation (although he may do so) to tell the patient that there are possible risks since there are such risks in any operation. It becomes a question of fact of how specific are any questions that are put and, equally, it is an issue of fact whether, questions or no questions, the evidence supports a finding that there were probable or special or unusual risks which the surgeon failed to disclose or did not fully disclose.

No doubt, a surgeon has some leeway in assessing the emotional condition of the patient and how the prospect of an operation weighs upon him; the apprehension, if any, of the patient, which may require placating; his reluctance, if any, to submit to an operation, which, if the surgeon honestly believes that the operation is necessary for the preservation of the patient's life or health, may demand detailed explanation of why it is necessary. All of this goes to informed consent and is entirely apart from the skill and care with which the operation is performed. It is, as I noted earlier, for the patient to decide whether to allow the surgery to be carried out.

Kenny v. Lockwood was considered in Halushka v. University of Saskatchewan, supra, a case involving voluntary submission to an experiment as part of medical research into a new anaesthetic drug. The "patient" was told that a new drug was involved and that the proposed test was quite safe, having been conducted many times before. In fact, however, the new drug had not been used or tested before and there was a risk involved in the use of a new anaesthetic. Brain damage resulted to the "patient" who suffered cardiac arrest but was ultimately resuscitated. Hall J.A., speaking for the Saskatchewan Court of Appeal and affirming the trial judge's imposition of liability, on the verdict of a jury, upon the two doctors who carried out the experiment, said this:

In ordinary medical practice the consent given by a patient to a physician or surgeon, to be effective, must be an "informed" consent freely given. It is the duty of the physician to give a fair and reasonable explanation of the proposed treatment including the probable effect and any special or unusual risks.

In my opinion the duty imposed upon those engaged in medical research, as were the appellants Wyant and Merriman, to those who offer themselves as subject for experimentation, as the respondent did here, is at least as great as, if not greater than, the duty owed by the ordinary physician or surgeon to his patient. There can be no exceptions to the ordinary requirements of disclosure in the case of research as there may well be in

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ordinary medical practice. The researcher does not have to balance the probable effect of lack of treatment against the risk involved in the treatment itself. The example of risks being properly hidden from a patient when it is important that he should not worry can have no application in the field of research. The subject of medical experimentation is entitled to a full and frank disclosure of all the facts, probabilities and opinions which a reasonable man might be expected to consider before giving his consent. The respondent necessarily had to rely upon the special skill, knowledge and experience of the appellants, who were, in my opinion, placed in the fiduciary position described by Lord Shaw of

Dunfermline in Nocton v. Lord Ashburton, [1914] A.C. 932 at p. 969.

In the view of the Court of Appeal, there were undisclosed or misrepresented facts and, it added, "[they] need not concern matters which directly cause the ultimate damage if they are of a nature which might influence the judgment upon which the consent is based".

I would refer also to Male v. Hopmans[8], a judgment of the Ontario Court of Appeal. It affirmed the trial judge's finding of liability of a physician, an orthopedic surgeon, who treated a patient for a serious infection by the use of a drug which carried the risk of impairing the

patient's hearing. The treatment in question was post-operative and was administered when it appeared that the patient had developed a serious pus condition in his left knee upon which an operation had been performed by the surgeon. The surgeon administered a drug which he had never used before, although knowing from the literature on it that it carried the risk of side effects. There was expert evidence that certain tests should have been carried out in the early stages of the treatment, and the trial judge found (and the Court of Appeal affirmed this finding) that the need for such tests ought to have been apparent to the surgeon but they were neither ordered nor made. The patient became completely deaf as a result of the treatment. It was on the ground of failure to order or make the tests that liability was imposed, this

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being the third ground of negligence charged against the surgeon.

Male v. Hopmans brought the New Zealand case of Smith v. Auckland Hospital Board[9], on appeal[10], into Canadian law, especially through the lengthy quotations by the trial judge from that case. The Smith case appears, with some caution, to formulate a professional medical standard for informed consent, as the following passage from the reasons of the trial judge in that case indicates (at pp. 250-251):

As it seems to me, the paramount consideration is the welfare of the patient, and given good faith on the part of the doctor, I think the exercise of his discretion in the area of advice must depend upon the patient's overall needs. To be taken into account should be the gravity of the condition to be treated, the importance of the benefits expected to flow from the treatment or procedure, the need to encourage him to accept it, the relative significance of its inherent risks, the intellectual

and emotional capacity of the patient to accept the information without such distortion as to prevent any rational decision at all, and the extent to which the patient may seem to have placed himself in his doctor's hands with the invitation that the latter accept on his behalf the responsibility for intricate or technical decisions.

This duty appears to me to be governed by all the factors I have mentioned as they would be assessed and applied by a reasonably prudent medical practitioner; and the need to include descriptions of the adverse possibilities of treatment in the explanations must depend upon the significance which that prudent doctor in his patient's interests would reasonably attach to them in all the environment of the case. I certainly am not prepared to hold, in the absence of authority, that doctors should be distracted from their prime responsibility to care for the health of their patients by the thought that there is an almost automatic need to describe these possibilities in order to avoid a claim in negligence should something, by bad chance, go wrong.

Male v. Hopmans is not a case directly concerned with informed consent, but a portion of the reasons of Aylesworth J.A., who spoke for the Ontario Court of Appeal, bears on that issue,

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especially as it relates to a situation in which a patient who has a serious condition for which risky therapy or treatment is contemplated. So much depends on the particular facts, according to the Ontario Court of Appeal, when the question is whether the surgeon has a duty to warn the patient, and it may be relevant to that duty whether the patient is in a condition to make a choice.

I am far from persuaded that the surgeon should decide on his own not to warn of the probable risk of hearing or other impairment if the

course of treatment contemplated is administered. A surgeon is better advised to give the warning, which may be coupled with a warning of the likely consequence if the treatment is rejected. The patient may wish to ask for a second opinion, whatever be the eminence of his attending physician. It should not be for that physician to decide that the patient will be unable to make a choice and, in consequence, omit to warn him of risks. Of course, on the view already expressed that, generally, there has been prior consent, the probable risks would be those that, if he was informed about them, would reasonably be expected to affect the patient's decision to submit or not to submit to a proposed operation or treatment. I find it difficult, however, to conclude that if there are probable risks (as opposed to mere possibilities such as those inherent in any operation or therapy, e.g. the risk of infection) they would not also be material in the sense of the objective standard that has been proposed in some writings and cases. Thus, in the article by Waltz and Scheuneman, referred to above, at p. 640 thereof, a proposed standard of materiality, adopted by the Court in Canterbury v. Spence, supra, is expressed as follows:

... [a] risk is ... material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to undergo the proposed therapy.

No doubt, this invites a finding of fact upon which expert medical evidence of the judgment to be exercised would be admissible but not determinative.

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Indeed, since a particular patient is involved upon whom particular surgery is to be performed or particular therapy administered, and it is

a duty of disclosure to him that affects the validity of his consent, evidence of medical experts of custom or general practice as to the scope of disclosure cannot be decisive, but at most a factor to be considered.

The case law on the question of informed consent or the duty of disclosure has exhibited a variety of classifications of risks involved in proposed surgery or therapy. Probable risks, which must be disclosed, have been contrasted with mere possibilities (as, for example, risks involved in any operation), but this dichotomy cannot be absolute because it ought to take note of whether a risk is or is not quite remote, and here the gravity of the consequences, if a risk should materialize, must be brought into account; for example, the risk of death, even if a mere possibility, as contrasted with some residual stiffness of a member of the body. A second classification, expressed in American cases and American writings, is that of material and immaterial risks. Under this classification possible risks whose consequences would be grave could well be regarded as material. Materially connotes an objective test, according to what would reasonably be regarded as influencing a patient's consent.

Then there is the language of special or unusual risks, in contrast to those inherent in any operation. This contrast was expressed by Morden J. in Kelly v. Hazlett[11], at p. 319. If by special or unusual risks is meant merely probable risks, then this classification is substantially the same as the probable—possible one that I have already referred to, subject to qualifying possible risks by the gravity of the consequences if such a risk should materialize. Special or unusual risks may, however, go beyond those that are probable in respect of the

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surgery or therapy involved in a particular case and could relate to serious consequences in the particular instance even if the risk be a mere possibility. On this view, the classification is incomplete, in not taking account of probable risks. Of course, if specific questions are asked, this introduces another element but here the evidence touching the specific character of the question will first have to be assessed.

In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.

The present case is not one which calls for more refinement of issues touching the duty of disclosure and its extent. In my view, the findings of the trial judge make this unnecessary. There are, however, certain observations in the majority reasons of the Alberta Appellate Division to which I wish to refer. I cannot agree with Morrow J.A. when he said, in the concluding summarizing passage of his reasons, quoted above, that there was manifest error in the trial judge's acceptance of the expert evidence that the particular operation could be carried out in Lethbridge as well as in Calgary, if without complication. The appellant also so testified and, on the whole evidence, including that which described the operation performed by the appellant as a routine disc operation, it was open to the trial judge to make the findings that he did make.

I agree, of course, that if Morrow J.A. meant that the patient had not been properly informed of

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the risks, whether or not the operation could be performed as well in Lethbridge as in Calgary, it was for him to decide where it should be performed. However, the record does not support a conclusion that the plaintiff had made the question of the place of performance of the operation central to his consent or that the appellant had failed to provide the information that was requested.

Morrow J.A. made two statements going to causation and to damages which I also cannot accept. The first statement is as follows:

... The evidence does leave it open for the trial judge to have reasonably found that had the operation been in Calgary, rather than in Lethbridge (accepting that there would have been consent to the operation in any event) the problem which arose from the first operation and which made the second operation necessary might at least have been discovered earlier with less possible neurological deficit.

This goes against the findings of the trial judge that (1) it could not be said that the permanent disability of the respondent had not occurred as a result of the original disc condition and (2) he was not satisfied that the extruded portion of the disc removed by the second operation was present when the appellant operated. Morrow J.A.'s reasons, at the most, go to suggest that the patient might possibly have suffered less damage if he had gone to Calgary in the first place. This was highly conjectural and cannot form the basis of a judgment for the patient. Morrow J.A. also appeared to found liability on the following basis (this being the second statement that I question):

... One cannot read the testimony of the appellant without gathering that in his own mind, whether it is justified or not, he has been left with the feeling that his lengthy period of recuperation and the second operation and indeed his present poor condition, is to be a considerable degree attributable to the efforts of the respondent.

This is not a tenable ground, however sympathetic one is inclined to be with the respondent's present plight.

I would allow the appeal, set aside the judgment of the Alberta Appellate Division and restore the

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judgment of Brennan J. dismissing the action. The appellant is entitled to costs throughout. The cross-appeal is dismissed without costs.

Appeal allowed with costs; cross-appeal dismissed without costs.

Solicitors for the defendant, appellant: Jones, Black & Co., Calgary.

Solicitors for the plaintiff respondent: Babki & Co., Lethbridge.

[3] (1965), 53 D.L.R. (2d) 436.

R v Ewanchuk Case Brief

R. v. Ewanchuk, 1999 CanLII 711 (SCC), [1999] 1 SCR 330

Facts: 17 year old girl went for job interview in the back of a van. Accused made sexual advances. The accused stopped when asked. The girl never left and the accused always started back up again. At trial, the complainant testified that because she was scared, she tried not to let the accused know she was afraid. She tried to act comfortable in a way that he would not sense any fear.

Issue:

1.Is there a defence of "implied consent" in the context of sexual assault?

2.Could the accused honestly have believed that the complainant consented?

Ratio: There is no defence of implied consent to sexual assault in Canadian law.

Consent plays two roles in sexual assault cases:

oAR: "consent" means the complainant in her mind wanted the sexual touching to take place

oMR: "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused

1.**Actus Reus:**i. touching (objective), ii. the sexual nature of the

contact (objective), and iii. the absence of consent (subjective)

oAccused's perception of the complainant's state of mind is not relevant

oTo be legally effective, consent must be freely given (therefore even if complainant consented, or her conduct raises a reasonable doubt about her non-consent, circumstances may arise which call into question what factors prompted her apparent consent)

oThe code defines conditions under which the law will deem an absence of consent notwithstanding the complainant's ostensible consent

o S.265(3): submission by reason of force, fear, threats, fraud or the exercise of authority; consent given under fear/duress is ineffective

oCourts are concerned with whether the complainant freely made up her mind about the conduct

oS.265(3)(b): there is no consent as a matter of law where complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force

oTrier of fact only has to find that complainant did not want to be touched and made her decision to permit/participate in sexual activity as a result of an honestly held fear

oThe fear need not be reasonable or communicated to the accused for consent to be vitiated

2.**Mens Rea [general intent]:** i. intention to touch, and ii. knowing or being reckless or wilfully blind to a lack of consent on the part of the person touched

oConsent is viewed from perception of the accused

oEvidence must show that accused believed the complainant communicated consent to engage in the sexual activity in question

oDefence of honest but mistaken belief of consent available if accused was operating under a wholly innocent state of mind

oHonest = "air of reality"

oAir of reality = something a jury could reasonably acquit on

Reasons:

Mistake of Fact

·Successfully raising the defence involves a **negation of MR**

oAvails an accused who acts innocently, pursuant to a flawed perception of the facts, but still commits the AR of an offence

oConsent cases: Defence depends on an honest belief in consent or an absence of knowledge that consent has been withheld

oDefence only available where there is sufficient evidence presented by an accused, by his testimony or by the circumstances in which the act occurred, to found the plea

Honest and Reasonable Mistake

·An act is reasonable in law when it is such as a man of ordinary care would do under similar circumstances

·A crime requiring intention or recklessness cannot be committed if the accused was acting under a mistake of fact

·In drug possession cases, mistake of fact reaches its limits in circumstances where an accused's belief relates to a different but still illicit substance than the one actually possessed

·Precise knowledge of the type of narcotic possessed is not essential for a conviction